In the Matter of:

DAVID CONNER,
Claimant

v.

AUTEC RANGE SERVICES,
Employer

and

CIGNA INSURANCE COMPANY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest

Date Issued: March 23, 1999

Case No.: 1998-LHC-973

OWCP No.: 02-120602

APPEARANCES:

Howard Grossman, Esq.
For the Claimant

Keith Flicker, Esq.
For the Employer/Carrier

Mary Beth Bernui, Esq.
For the Director

BEFORE: **JAMES GUILL**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, *et seq.*), herein referred to as the "Act," as extended by the Defense Base Act (42 U.S.C. § 1651, *et seq.*). The hearing was held on July 26, 1998 in Fort Lauderdale, Florida, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and EX for an Employer/Carrier's exhibit. This decision is being rendered after having given full consideration to the entire record.

Preliminary Evidentiary Issue

Atthe June 26, 1998 hearing, Respondents submitted a surveillance report of Mr. William Morris. This exhibit was identified as EX D. At the hearing, Complainant objected to its admission into evidence, and this Judge took the matter under advisement. (TR 37-38) By document filed July 14, 1998, however, Respondents have withdrawn the surveillance report. (EX L) Accordingly, the exhibit identified as EX D, is hereby rejected, and will not be considered in this Decision and Order.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
EX J	Respondents filing of Request for Transient Guest Housing Form	7/14/98
EX K	Respondents filing of an AUTEC new employee brochure	7/14/98
EX L	Letter submitting EX J and EX K and withdrawing EX D	7/14/98
CX 55	Claimant's memorandum of law in support of calculations of Claimant's Average Weekly Wage	7/14/98
EX I	Deposition of Dr. Audie Rolnick	7/23/98
CX 56	Claimant's post-hearing brief	8/13/98
DX 1	Director's post-hearing brief	9/14/98
EX M	Respondent post-hearing brief	9/18/98

The record was closed on September 18, 1998.

Stipulations and Issues

The parties stipulate, (TR 5-11) and I find:

1. The Act applies to this proceeding.
2. Claimant and the Employer were in an employee-employer relationship at the relevant times.
3. On February 13, 1997, Claimant suffered an injury in the course and scope of his employment.
4. Claimant gave the Employer notice of the injury in a timely manner.
5. Claimant filed a timely claim for compensation on June 6, 1997 and the Employer filed a timely notice of controversion on September 10, 1997.
6. The parties attended an informal conference on September 10, 1997.
7. The Employer voluntarily and without an award has paid temporary total compensation from February 25, 1997 through June 6, 1997, at the rate of $200.27 per week, for a total of $2,231.56.

The unresolved issues in this proceeding are:

1. The date of his maximum medical improvement.
2. Nature and extent of claimant's disability.
3. Average weekly wage.
4. Claimant's entitlement to medical benefits.
5. Section 8(f) relief.

Summary of the Evidence

David Lee Conner (Claimant) is a fifty year old man, with a Bachelor of Science in Biology. (EX H at 103-13; TR 47). Since his graduation from college, Claimant has had held a variety of jobs involving both scientific employment and construction work. (TR 47-49). On or about May of 1990, Claimant was hired by City Electric as an environmental lab technician, where he was responsible for performing "boiler-water chemistry/environmental surveys and hazardous material cleanup." (TR 19, 49). Claimant's salary at City Electric started at $9.00 an hour, and gradually increased, so that when he left he was making $14.00 an hour. (TR 49-50).

On September 14, 1992, Claimant suffered a head and neck injury while working for City Electric. (TR 50; EX H). While removing a boat from a trailer, Claimant slid off the trailer, fell backwards and hit his head on the trailer, knocking him unconscious. (TR 50). He was examined by several local physicians, and was treated with medication and therapy. (EX G; EX H at 104). Claimant returned to work but continued to experience neck pain.

On March 26, 1993, Claimant was examined by Michael D. Lusk, M.D., for this pain. (EX G). Dr. Lusk reviewed Claimant's relevant medical history and subjective complaints and performed physical and neurological examinations. Dr. Lusk concluded that Claimant suffered from a chronic cervical strain, but without palpable muscle spasm. (EX G).

Dr. Lusk examined Claimant one week later on April 2, 1993. At this time, he noted that an MRI was performed which was "essentially normal with a questionable small disc at C6-7," but noted that Claimant's condition did not require surgery. (EX G). He recommended physical therapy on an intermittent basis,and placed Claimant at maximum medical improvement as of April 2, 1993 "with rigidity, loss of motion or possible abnormality of chronic muscle spasm, chronic muscle spasm rigidity substantiated by objective clinical findings but without associated demonstrable degenerative changes a 3.5% disability." (EX G).

On April 27, 1993, Claimant was examined by Jaime Benavides, M.D., who also reviewed the prior MRI results and studies. Dr. Benavides diagnosed herniated disc at C5-6 with mild radiculopathy. He issued a fair prognosis with a 14% impairment to the body as a whole under Minnesota and AMA guidelines. (EX H at 123). Regarding maximum medical improvement, Dr. Benavides stated: "Patient's condition is quite stable and therefore would be considered as having reached maximum, however, if the blocks are done and are successful, then this would be altered and the disability rating would diminish in accordance with the result." (EX H at 123).

On July 8, 1993, Dr. Lusk had a follow-up visit with Claimant where Claimant continued to

complain of pain in the neck and weakness. Dr. Lusk noted that a cervical myelogram and CT scan would be performed. Subsequently, on August 10, 1993, Dr. Lusk performed cervical fusion surgery, and removed Claimant from work. (EX G; EX H). Following surgery, Claimant periodically contacted Dr. Lusk and appeared to have a good recovery. On September 16, 1993, Dr. Lusk noted that Claimant could return to work on October 1, 1993 without restrictions. (EX G at 92).

Claimant returned to work as a lab technician at City Electric for one year, after which he was transferred to a customer service position. (TR 51-52).[1] On September 15, 1994, Claimant suffered another work-place injury, when he strained his spinal muscles in a lifting accident. (EX H at 126-32). On May 15, 1995, Claimant entered into a settlement with City Electric, and resigned from his position. (TR 53-54).

Both Claimant's September 14, 1992 and September 15, 1994 injuries resulted in a Florida workers' compensation claim which was settled on June 21, 1995. (EX H at 103-13). The settlement agreement reported that Dr. Lusk had found that Claimant had reached maximum medical improvement in December of 1994, and had a nine (9) percent permanent partial impairment to the body as a whole. Further, the settlement noted Dr. Lusk's opinion that Claimant's future activity should be limited in terms of lifting and repetitive movement.

Following his resignation, Claimant neither worked nor sought employment from August of 1995 until March of 1996. During this interim period, Claimant traveled and sailed alleging personal reasons for the time off from employment. (TR 54)

In mid-1996, Claimant contacted the human resources department at AUTEC (Employer), looking for employment. Employer is a contractor for the United States Navy that performs various functions and testings on Andros Island in the Bahamas. The positions available at this location consisted of food services, janitorial, environmental control, and power plant officer positions. Originally, Claimant hoped to obtain a position utilizing his Biology degree and environmental experience, however, Claimant did not meet some of the qualifications of these positions. Therefore, on December 10, 1996, Claimant took a food services opening with Employer as a clerk in the food warehouse department, with the hope and expectation that an environmental job would eventually be available to him. (TR 59 & 114; CX 50 at 184).

Claimant's duties as a food warehouse clerk involved lifting and moving packaged foods. (TR 59). Claimant was paid $5.75 per hour, including a bonus. (TR 59). In addition to salary, Employer provided room, board and meals to employees, although all employees had the option to live off base and eat outside of the company mess hall. (TR 59-60; CX 50 at 184). Claimant was not charged for either the room or the meals. (TR 60).

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[1]Claimant submitted arguments and allegations concerning his ability to perform the duties of a lab technician, and the circumstances surrounding his resignation from City Electric. (TR 52-53) I conclude, however, that such facts and circumstances do not need an examination in this proceeding.

Respondents presented Mary Catherine Lee as a witness at the hearing. Ms. Lee is the human resource administrator for Raytheon at Andros Island, Bahamas. (TR 121). Prior to working for Raytheon, Ms. Lee was employed by Employer for three years as a human resource representative. (TR 122). In this position she was responsible for processing new hires from the United States. Ms Lee testified concerning EX K and J, and specifically about the meal and lodging benefits provided by Employer to its employees. Ms. Lee testified that Employer provided meals and lodging to employee as "part of the package. . . . it's part of the job." (TR 128). She testified that employees are not required to eat or live on the premise, but it is provided free of charge for the convenience of the Employer. (TR 128-29). If an employee chooses not to take advantage of these services, the Employer does not provide a stipend for alternative housing. (TR 131-32). Ms. Lee also testified to the fact that non-employees were charged to utilize Employer's lodging, and that rate was $6.00 per day until December 1996, and $24.00 per day since January 1997. (TR 126). Further, she noted that the lodging available to visitors was "similar," but not identical to that available to employees. (TR 128).

On February 13, 1997, Claimant suffered a work-place injury when he pulled his back while moving a box of frozen meat weighing approximately seventy-five pounds. (TR 61). This injury is the basis for the present claim for benefits.

Claimant was initially examined by Dr. Sweet, who provided an injection and medication. (TR 62). Claimant was off work for one week and later returned to light duty work answering telephones. (TR 62-63). Claimant, however, continued to have "trouble bending, moving, standing, [and] walking." (TR 64).

Claimant was examined by Mark Waeltz, M.D. on February 25, 1997. Dr. Waeltz reviewed Claimant's medical history, and noted that he had a cervical injury and fusion at C3-4, but that Claimant had no prior back injuries. (EX A). Dr. Waeltz performed a physical examination and took x-rays of the thoracic spine which were "within normal limits," and of the lumbar spine which "show[ed] some anterior traction spurs." (EX A). Dr. Waeltz concluded that Claimant had a thoracic and lumbar strain and prescribed medication for pain. (EX A). He recommended light duty work, with the following restrictions: "No repetitive waist bending, no lifting over five pounds, no mopping and sweeping." (EX A).

On March 12, 1997, Claimant was examined by Dr. Lusk, who noted Claimant's history since his prior examination and recommended that an MRI be performed. (EX G). This MRI was performed on March 13, 1997, by Joseph Kandel, M.D. The MRI of the thoracic spine was "borderline, showing T8-9 disc protrusion without neural structure compromise," and the MRI of the lumbar spine showed "L2-3, L3-4 and L4-5 broad-based disc protrusion without neural structure compromise or nerve root impingement at the lateral recess exit zones." (CX 40 at 83).

On March 14, 1997, Dr. Lusk placed Claimant on light duty work, with a weight restriction of twenty pounds, maximum. (TR 65, 82-83). He also recommend physical therapy, which was subsequently denied by the Employer. (TR 65).

Dr. Waeltz next examined Claimant on March 26, 1997. He noted that an MRI scan was performed, and reviewed by Dr. Lusk. He reported that "[t]he thoracic MRI showed spondylosis, but no surgical lesions. The lumbar spine MRI showed acute disc herniation at L5-S1 which was small and not a surgical lesion." Dr. Waeltz diagnosed "acute herniated disc L5-S1, and recommended physical therapy and light duty work with a twenty pound restriction. (EX A).

Claimant was last examined by Dr. Waeltz on May 9, 1997. Dr. Waeltz maintained his prior diagnosis and concluded, "Nonoperative treatment is recommended. The patient is at maximum medical improvement for nonsurgical treatment. He should be placed on light duty status as previously described. No lifting over 20 pounds, no repetitive waist bending." (EX A). Claimant has also submitted the deposition testimony of Dr. Waeltz in which he discusses his examination and analysis. (CX 52). In his deposition, Dr. Waeltz reconfirmed his finding concerning maximum medical improvement and work restrictions. (CX 52 at 14-18). Further, he provided brief opinions on Claimant's ability to perform several job positions, which shall be discussed in greater detail later in this Decision and Order.

In early 1997, the contract between Employer and the navy base ended, and Raytheon was the new contractor. (TR 67). On January 29, 1997, the General Manager of Employer sent a letter to Claimant informing him that he would be permanently laid off effective March 31, 1997, and recommending that he seek employment with either Johnson Controls or Computer Science Corporation. (CX 50 at 180). Raytheon was new contractor effective April 1, 1997. (TR 67). Claimant requested a light-duty job with Raytheon, but, according to Claimant the only opportunity Raytheon presented involved the ability to lift eighty-five pounds. (TR 67).

Shortly thereafter, Employer requested that Claimant undergo an Independent Medical Examination with Audie Rolnick, M.D. Employer sent Claimant a letter informing him that a medical examination was scheduled for June 3, 1997. This letter, however, was sent to the Jensen Beach address of Claimant's girlfriend's mother's house. Claimant testified that he had previously informed Employer not to mail information to that address. Nevertheless, the letter was mailed to Jensen Beach, and Claimant did not receive the letter until June 4, 1997, thus he missed the June 3, 1997 appointment. On June 4, 1997 Claimant contacted Joan Bornt about the circumstances involving the letter and stating that he would be willing to undergo a newly scheduled independent medical examination. (TR 69-70; CX 20).

On June 6, 1997, Respondents suspended benefits, based upon Claimant's missing of the independent medical examination, and stated that no further medicals would be paid. Shortly thereafter, Claimant sought authorization for treatment with Stuart B. Krost, M.D., however, this request was denied. (TR 72).

Despite this denial, on August 21, 1997, Claimant was examined by Dr. Krost, who reviewed Claimant's medical history and performed a physical examination.[2] (CX 40 at 81). Dr. Krost

[2]Claimant agreed to have Krost's bills paid via a letter of protection. (TR 72)

concluded that Claimant had yet to reach maximum medical improvement and recommended that further pain management techniques be used to improve Claimant's condition. (CX 40 at 82). Dr. Krost scheduled an electro diagnostic study and continued therapy.

Claimant underwent the electro diagnostic study on September 5, 1997, which "revealed no evidence of radiculopathy, neuropathy or distal nerve entrapment." (CX 40 at 79). A few weeks later, Claimant returned to Dr. Krost reporting a twenty to thirty percent improvement in terms of his pain symptomatology. (CX 40 at 77-78). On October 10, 1997, Dr. Krost discontinued formal therapy and recommend home exercises. (CX 40 at 77).

In October of 1997, at Employer's request, Claimant was examined by Audie M. Rolnick, M.D., who performed an Independent Medical Examination. (EX B). Dr. Rolnick reviewed Claimant's medical history and subjective complaints in addition to radiographic data. Dr. Rolnick then diagnosed: "Chronic lumbar strain and sprain, bulging discs, cannot totally rule out annular tears. Does not appear to be any neural involvement or neural impingement. May have some facet inflammation and mild spasms in the back area." (EX B). Dr. Rolnick went on to recommend "attempts epidural and/or facet and/or trigger point blocks as recommended by Dr. Krost," but no further therapy. (EX B). Further, he stated that living on a boat did not pose a problem, and that Claimant is capable of performing light duty work with "minimal bending, standing for short periods of time" and lifting under twenty pounds. (EX B).

On February 10, 1998, Dr. Rolnick completed a Physical Capacities Evaluation from Intracorp. (EX B at 10). This form provided Dr. Rolnick's opinion on the type of work activities Claimant could perform, and for how long. Dr. Rolnick opined that Claimant could work forty hours a week provided certain activities were limited, such as a restriction on lifting over twenty pounds, and driving or walking no more than three to five hours a day. (EX B at 10).

On March 10, 1998, Dr. Krost issued a final report noting that Claimant was benefitting from taking Ultram and still looking for sedentary work. Dr. Krost prescribed Ultram and noted Claimant would return on an as needed basis. (CX 40 at 75). Between March 10 and April 30, 1998, Claimant reported an exacerbation of pain to Dr. Krost. (CX 51 at 20). Dr. Krost referred Claimant to an anesthesiologist, Dr. Richard Wayne, to consider epidural injections. After an evaluation, Dr. Wayne administered three epidural injections on Claimant. On April 30, 1998, Claimant initiated a visit with Dr. Krost in which Dr. Krost noted that Claimant underwent two epidural injections, with a third scheduled which may or may not improve Claimant's condition. (CX 51 at 46). Dr. Krost opined that Claimant had reached maximum medical improvement on April 30, 1998. (CX 51 at 23).

Dr. Rolnick issued a second independent medical examination report on May 29, 1998, based on a new physical examination and review of radiographic evidence. Dr. Rolnick concluded that Claimant suffered from chronic lumbar strain with bulging discs which at that time was stable. Further, he recommended that Claimant undergo home exercise and stretching program. Dr. Rolnick concluded, "At this time the patient does not require any additional medical care as it relates to his incident of February 13, 1997. The patient is at Maximum Medical Improvement at this time. I have reviewed all the job positions which have been presented to the patient and, other than the job

position at Sterling in Boca Raton, Florida, I feel each and every job position is appropriate for this patient and he would be capable of doing each one." (EX B at 12).

On July 14, 1998, Respondent deposed Dr. Audie Rolnick concerning his independent medical evaluation of Claimant. (EX I). Dr. Rolnick provided a detailed elaboration upon the several medical reports he reviewed, in addition to describing his own tests and physical examination of Claimant. In describing his diagnosis, Dr. Rolnick stated: "Chronic lumbar strain and sprain, bulging discs, possible annular tears, no neural involvement, may have some facet inflammation. . . . there was no significant lumbar radiculopathy component. His pain — basically, he had normal navigation, no pain behind the knees, and straight leg was negative." (EX I at 10).

Dr. Rolnick also discussed his second examination and report concerning Claimant, which occurred in May of 1998. Following his review of Claimant's medical records since his last examination and physical examination, Dr. Rolnick reached the same diagnosis. Further, he stated that Claimant did not need any further medical care, but only needed to work with the home exercise program. (EX I at 19). Dr. Rolnick testified that Claimant underwent three epidurals after his last visit and did not feel that any more were necessary because they were not providing significant relief and because the leg pain had decreased. (EX I at 19-20). He also stated he would change the maximum medical improvement to May 29, 1998. (EX I at 20).

As discussed previously under the heading Preliminary Evidentiary Issues, the surveillance report prepared by William Morris has been withdrawn as an exhibit from this case. Nevertheless, the video tape prepared by Mr. Morris has been admitted into evidence, without objection. (EX E). Upon review of the videotape, I find it displays Claimant's actions over two dates in 1998. The tape shows Claimant engaged in everyday activities, including walking, driving and shopping. The video also shows Claimant carrying a small gas tank which is filled at a gas station, a tank which Claimant stated was no more than ten pounds. (TR 74).

Currently, Claimant testified that he still experiences pain and discomfort. He stated he is willing to work, but has difficulty performing certain tasks. He testified that he experiences pain when he sits for long period of time, for example, when driving for extended periods of time. (TR 89). He stated that he must sit and stand intermittently during the day to avoid pain. (TR 91). Claimant doubts his ability to carry a ten pound object around for eight hours a day. Further, Claimant stated that he could not walk for several hours a day. (TR 91). During his testimony at the hearing, I noticed Claimant alternating between sitting and kneeling in the witness box. I also note that this was done in a very subtle way as not to draw attention to what he was doing. In other words, my impression was that because of discomfort, it was necessary for him to shift his weight from sitting to kneeling. (TR 120). Currently, Claimant lives on a boat and needs to manually raise and lower the sails, the difficulty depending on the amount of wind. He testified that he has not been able to sail his ship since his last injury, and no evidence to the contrary was offered. (TR 46).

On the basis of the totality of this record and having observed the demeanor and heard the testimony of Claimant, I make the following:

Findings of Fact and Conclusions of Law

The parties stipulated to a majority of the issues and I have accepted these stipulations as being supported by the evidence. Accordingly, the issues remaining are: the nature and extent of the disability, the date of maximum medical improvement, the average weekly wage, the applicability of Section 8(f), and the availability of medical benefits.

I. Date of Maximum Medical Improvement

Several different opinions have been submitted regarding the date of maximum medical improvement. Initially, Dr. Waeltz released Claimant to work, at maximum medical improvement on May 9, 1997, less than three months following the injury. (EX A at 4). Dr. Rolnick originally opined that Claimant reached maximum medical improvement on October 20, 1997, however, he later changed that date to May 29, 1998. (EX I at 20). Dr. Rolnick reasoned that upon his second examination of Claimant, together with the treatment performed by Drs. Krost and Wayne, he felt Claimant did improve, and that he was currently at maximum medical improvement. Finally, Dr. Krost testified in deposition that Claimant reached maximum medical improvement on April 30, 1998. (CX 51 at 23)

I find that Claimant reached maximum medical improvement on April 30, 1998 and that he has been permanently and partially disabled from May 1, 1998, according to the well-reasoned opinion of Dr. Krost. (CX 51 at 23-25) I find that Dr. Waeltz's opinion on maximum medical improvement was premature as Claimant required additional treatment. Further, while I note Dr. Rolnick opined that maximum medical improvement occurred on May 29, 1998, I believe the well-reasoned opinion of Dr. Krost is the more reliable opinion as he had closer monitoring of Claimant's condition, providing him the best position to determine the proper date of maximum medical improvement.

II. Nature and Extent of Disability

As disability under the Act is an economic concept based upon a medical foundation, the extent of disability cannot be measured by physical or medical condition alone. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption, however, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which he is capable of performing and which he could secure if he diligently tried. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985), *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981).

A. Unable to return to former employment

I find that Claimant has established he cannot return to work as a food warehouse clerk. This position requires a significant amount of heavy lifting, which all of the doctors agree he cannot do. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Respondents do not carry this burden, Claimant is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Company*, 17 BRBS 64 (1985).

B. Suitable Alternative Employment

It is well-settled that Respondents must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). For the job opportunities to be realistic, Respondents must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). While I may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985), Respondents must identify specific available jobs; generalized labor market surveys are not enough. *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981).

The record contains substantial evidence concerning Claimant's residual capacity to work, and the availability of suitable alternate employment. Claimant has established that as a result of his February 13, 1997 injury, he was unable to return to work as a food warehouse clerk. Further, he testified that he has not been employed since being laid off on March 31, 1997. (TR 67). He, however, testified that he is willing and able to work under the medical restrictions suggested by his physicians.

The record establishes that Claimant is able to return to work. Dr. Waeltz, who examined Claimant three times, concluded in each report that Claimant could return to work with light-duty work, and a twenty (20) pound lifting limitation. (CX 42 at 135-40; CX 52 at 23). Dr. Lusk, in a March 14, 1997 report, concluded that Claimant could perform light-duty work, with a twenty pound lifting restriction. (CX 41 at 120). Dr. Krost originally concluded that Claimant was unable to work (CX 41 at 109-11), but later agreed that Claimant could return to work under the limitations set forth by Dr. Waeltz. (CX 51 at 46). Finally, Dr. Rolnick concluded in both of his independent medical examinations, that Claimant could return to light-duty work, with lifting and movement limitations. (EX B at 7-10).

Respondents submitted a labor market survey dated June 12, 1998, together with the live

testimony of the two vocational counselors who prepared the report: Victor Steckler[3] and Marian Marracco-Morris.[4] In preparing the labor market survey, Mr. Steckler and Ms. Marracco-Morris relied upon: a telephone interview with Claimant (TR 142); Claimant's written responses to questions, (TR 143); medical reports, primarily Dr. Rolnick's February 10, 1998 independent medical evaluation, together with "a host of records in terms of history," (TR 143); and a general review of Claimant's educational, employment, and earning histories. (TR 145). Both testified to the method they employed to both find potential positions, and their contact with prospective employers to determine the requirements and demands of each position. Upon analysis, Mr. Steckler and Ms. Marracco-Morris, identified twenty-three potential positions which, in their opinion, constituted suitable alternate employment for Claimant. Such positions, they concluded, were within Claimant's physical restrictions, education and experience, and within a reasonable commute from Jensen Beach, Florida.[5] (TR 146).

The Labor Market Survey identifies twenty-three positions and each clearly listed relevant information about each job opening, including: the dates of availability, a job description, qualifications, salary information, and contact information. (EX C). The twenty-three openings were in the following positions: personal care instructor at a cerebral palsy organization; monitoring halfway house; account's manager; foreman/landscape; assembler; service advisor; auto service cashier; management trainee; security officer; staff resource associate; operator; accounts receivable clerk; clerical/tax collector; staff engineering associate; lot attendant; appointment setter; and retail. (EX C). The positions involved salaries ranging from $6.00 per hour to a yearly salary of $25,000.00. (EX C).

Upon completion of the Labor Market Survey, Respondents had the job openings reviewed by Drs. Krost, Rolnick and Waeltz. In his deposition testimony, Dr. Krost reviewed the first nineteen job openings, and concluded that they were within Claimant's physical restrictions. (CX 51 at 48-53). Dr. Waeltz also briefly reviewed the job openings, during his deposition and concluded that all the positions were within Claimant's work restrictions. (CX 52 at 25-29). Finally, Dr. Rolnick also discussed the job descriptions in his deposition, and concluded that Claimant had the physical capacity to perform all the jobs, except the one with Sterling, as it did not allow for frequent changes in position. (EX I at 21-24). He noted that Claimant should not be required to drive to work over thirty minutes at one time, but he could take periodic breaks. (EX I at 33, 37). He also stated that

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[3]Mr. Steckler works as the Senior disability management specialist at Intracorp. (TR 140). His educational background is in vocational counseling and he has a master's in psychology. (TR 140). Further he has "four national certifications: OWCP Certified Rehab Counselor, CRC' a CMM, which is a Certified case manager; and a CDMS, a Certified Disability Management Specialist." (TR 141). His CV is in evidence at EX C at 13.

[4]Ms. Marracco-Morris was formerly an employee of Intracorp as a disability management specialist and assisted Mr. Steckler in the preparation of the Labor Market Survey in this case. (TR 220).

[5]In describing the twenty-three positions that Mr. Steckler found he stated that the fact they are listed means: "That these jobs exist; that they're suitable with the person's skills and background; that they are within the person's physical capabilities; that they exist at a certain salary — whatever is documented; and they're available at the time that the survey was done, or retroactively, or both." (TR 146)

Claimant could not perform job 20, and had a fifty/fifty chance of performing job number 23. (EX I at 36).

In addition to the medical opinions in evidence in regards to the labor market survey, Claimant testified that he believed that he was physically able to perform all of the positions listed. Nevertheless, Claimant doubted his ability to obtain such employment, citing potential-employer's prejudice against his physical limitations.

In addition to the labor market survey and medical opinions, Respondents have submitted a videotape prepared by William Morris. (EX E). Respondents cite to the tape as evidence that Claimant is able to perform strenuous activities beyond his restrictions. Claimant, on the other hand, alleges that the tape only displays day to day activities all falling within the well-delineated medical restrictions placed by doctors. Upon viewing the tape, I agree with Claimant and find the tape unpersuasive on the issues presented in this case. The tape contains some of Claimant's activities over two days. All activities are well within Claimant's medical restrictions. Further, I find that Claimant's lifting and moving of the propane tank, which testimony places as between three and ten pounds, is completely within the range permissible. Accordingly, I find this offer of proof merely reinforces the medical evidence in this matter, and is otherwise unpersuasive on any material issue.

Claimant, while conceding that all the position are within his physical capability, challenges the labor market survey on several grounds. First, he argues that several of the positions are located too far from his current residence. Second, he challenges the availability of the jobs listed.

As previously noted, an employer must show jobs which are available within a claimant's "local community." Claimant argues that the majority of the positions listed in Respondent's labor market survey are more than twenty to thirty minutes away. Further, he submits that the medical opinion evidence suggests that he not drive or stay in any one position for too long a time. Finally, Claimant notes that he does not own a car which impedes his ability to commute to work. (TR 101).

Initially, I note that Mr. Steckler, at the hearing, withdrew position Number 9, from consideration, as it was approximately 90 miles from Jensen Beach. (TR 151). However, Mr. Steckler opined that the remaining positions were within forty-five to sixty-five miles from Jensen Beach. Specifically, the record notes that West Palm Beach is approximately forty-five miles from Jensen Beach, while Boca Raton is approximately sixty-five miles, and Deer Field Beach as approximately seventy-five mile. (TR 151, 190-92).

I find that the majority of positions are within a reasonable sixty-mile commute, and thus fall within Claimant's local community. I do, however, reject positions 5 (Boca Raton), 8 (in Deerfield Beach) and 9 (in Plantation), and 10 (Boca Raton) as beyond this reasonable commuting area. I also reject Claimant's argument that jobs must be confined to a half-hour commute. While it is true that Dr. Rolnick and Dr. Krost suggested that Claimant drive for only a half-hour at time, there is no evidence that Claimant cannot drive further if he feels able. (EX I at 33-38; CX 51). Further, the doctors suggested that after half an hour, Claimant stop and stretch, and walk around. Therefore, it is possible and reasonable for Claimant to take a break on his commute to farther positions. Finally,

I note that the majority of positions are located in West Palm Beach, where Claimant has applied to work before. Finally, Claimant's lack of a car does not prevent him from looking for work within his relevant local community. The Respondents' Labor Market Survey lists available public, or commuting transportation for all but one of the positions listed, excluding job numbers 8 and 9. Accordingly, I find that all of the jobs listed in Respondents' labor market survey, with the exception of positions 5, 8, 9, and 10, are located within Claimant's local community for the purpose of determining suitable alternate employment under the Act.

The next major challenge to the positions listed concerns availability. As noted, prior to and after the date of maximum medical improvement, the medical evidence clearly indicated that Claimant had the ability to return to work under certain restrictions. I have previously dated maximum medical improvement at April 30, 1998. As of that date, the medical opinion evidence concluded that Claimant had recovered from his injury and no longer required treatment. I find that this date, when Claimant's condition became stable, is the date that he was able to return to light-duty work, and that Respondents have shown suitable alternate employment as of this date.

The Labor Market Survey in this case was compiled between February and June of 1998. The medical evidence concerning Claimant's work restrictions was in the record at many points during 1997 and early 1998. Accordingly, I find that Respondents have introduced sufficient and credible evidence of suitable alternate employment, within Claimant's restrictions, and available as of the date of maximum medical improvement.

This conclusion does not mean that I adopt all of the remaining positions as suitable alternative employment. Reviewing these positions, it is necessary to eliminate several as they fail to qualify as realistic or available employment options to Claimant. First, I hereby reject position 3 which had only occasional openings. Occasionally is too ambiguous to qualify as suitable alternate employment under this Act. Next, I reject 6, 7, and 11 since they were filled prior to the point I find Claimant was able to return to work.

Of the remaining fourteen positions, I find they are all within the physical restrictions imposed by Claimant's physicians. Further, I note Claimant's candid admission that he could perform the physical requirements of those positions.

In view of the foregoing, and with the exceptions noted, I do accept the listed results of the labor market surveys because I determine that those jobs constitute, as a matter of fact and law, suitable alternate employment or realistic job opportunities. Thus, as the Respondents have shown the availability of suitable alternate employment within Claimant's restrictions, the burden now is on the Claimant to show that he is ready, willing and able to return to work, just like any other unemployed worker. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991).

C. Good Faith Effort to find Employment

Initially, I find that Claimant has the residual work capacity to perform the jobs identified by

Mr. Steckler and Ms. Marracco-Morris which have been accepted herein as constituting suitable alternate employment for the Claimant. The medical opinions of record, together with the Claimant's own testimony, establish that Claimant is physically able to perform the identified jobs, together with other light-duty work, as long as lifting is restricted to less than twenty pounds and that he should change positions from sitting to standing.

Claimant has established that he has diligently sought employment within the jobs shown to be available. He testified that he has been actively looking for work since March of 1997. (TR 105). He further submitted a job search log of places he has either filed an application, or made phone contact, however, Claimant has not received a single interview. (CX 13, 15 - 17; TR 105). Ms. Lee testified that Raytheon, upon taking over the Navy contract, did offer Claimant a position as food warehouse clerk, however, Claimant rejected that position because it would require lifting of up to eighty pounds and therefore was beyond his physical limitations. (TR 138).

In the fall of 1997, Claimant registered with the State of Florida Department of Unemployment and Labor. (TR 78). He testified that he would check in several times a week to look for professional, environmental work, and other interim jobs. (TR 79). Claimant never had any offers. (TR 80)

Claimant further testified that he did not receive the labor market survey from the Respondents until late June of 1998. (TR 80). On June 25, 1998, after he received the survey, he called all of the jobs listed on the labor market survey, but was informed that none of the employers were hiring. (TR 98). Claimant has the desire to return to work. (TR 80). Claimant also stated that, if given the choice, he would prefer to pursue his biology degree and he had no interest in pursuing a landscaping career. (TR 96). Finally, Claimant expressed concern over his lack of experience regarding some of the positions indicated in the survey. (TR 104). Despite this effort, Claimant has been unable to secure employment. Accordingly, Employer has failed to demonstrate suitable alternative employment, and Claimant is thus totally disabled as of May 1, 1998. *See Palombo, supra.*

III. Average Weekly Wage

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," *Duncan v. Washington Metro. Area Transit. Auth.*, 24 BRBS 133, 135 (1990), but 33 weeks is not a substantial part of the previous year. *Lozupone v. Stephano Lozupone and Sons*, 12 BRBS 148, 156-57 (1979). Claimant worked for the Employer for approximately nine (9) weeks prior to his February 13, 1997 injury, and therefore Section 10(a) is

inapplicable.

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to Section 10(c). *Palacios v. Campbell Indust.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir. 1991); *Duncan v. Washington Metro. Area Transit. Auth.*, 24 BRBS 133, 136 (1990). Section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wages should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same of similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). Accordingly, the record must contain evidence of the substitute employee's wages. *Duncan, supra*.

Respondents have presented the testimony of Ms. Lee who was employed in Employer's human resources department during the year preceding Claimant's injury. Ms. Lee testified to the wages of Claimant's supervisor, Harold Norman, who was paid $7.07 per hour, including an adjustment for fifteen percent foreign service pay. (TR 133) Thus, Mr. Norman's average weekly wage was $339.36. However, Respondents acknowledge that Mr. Norman had more time, experience, and responsibilities than Claimant. Ms. Lee also testified that other employees performing the same tasks as Claimant were paid $5.75 an hour, including a bonus. (TR 134)

Due to the paucity of evidence as to the wages earned by a comparable employee, Section 10(b) cannot be applied in this situation. *Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 698 F.2d 743 (5th Cir. 1983), *rev'g on other grounds* 13 BRBS 862 (1981), *rehearing granted en banc*, 706 F.2d 502 (5th Cir. 1983), *petition for review dismissed*, 723 F.2d 399 (5th Cir. 1984), *cert. denied*, 469 U.S. 818, 105 S. Ct. 88 (1984). The testimony of Ms. Lee alone regarding other employees does not provide sufficient documentation to render a proper calculation of average weekly wage under Section 10(b).

I therefore must rely on Section 10(c) in determining Claimant's average weekly wage.[6] The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." An administrative law judge thus has broad discretion in determining annual earning capacity under Section 10(c). *Sproul v. Stevedoring Servs. Of America*, 25 BRBS 100, 105 (1991); *Waylord v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Lobus v. I.T.O. Corp.*, 24 BRBS 137, 139 (1990).

Respondents submit that Claimant's average weekly wage, computed under Section 10(c), should be $276.00. They arrive at this amount by multiplying Claimant's hourly wage rate at the time

[6]The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). *See generally Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 237 (1985); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455 (1978); *McDonough v. General Dynamics Corp.*, 8 BRBS 303 (1978).

of injury "by a variable which reflects the number of hours which would normally be available to Claimant." *Lozupone*, 14 BRBS at 464-65. Respondents argue that this method is a much sounder basis for determining Claimant's average wage, as opposed to looking at earning in prior years. *Cf. Hayes v. P&M Crane Co.*, 23 BRBS 389, 394 (1990); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 344-45 (1988). Under this analysis, Respondents note that Claimant earned $5.75 per hour and worked forty-eight hour weeks, thus totaling $276.00 per week. (TR 59; EX F at 78-79) They rejected Claimant's argument that meals and lodging should be factored into the calculation of average weekly wage. In the alternative, Respondents argue that should this Judge consider prior earnings, those prior years should be limited to the two years prior to Claimant's injury, rather than looking back to 1991.

Claimant, on the other hand, proposes an average weekly wage of $498.51. He calculated this wage by examining his wages and earnings from 1991 to 1995 at City Electric. He offers that I should disregard his current earnings for failing to reasonably reflect his earning capacity. Specifically, Claimant argues that he took the food processing position solely to get his "foot in the door" at Employer's facility, and with the hope and expectation that a biology-related position would become available in the near future.

I note that Claimant's figure of $498.51 does not take into account the period from May 15, 1995 to December 10, 1996 when he had no earnings. He submits that an alternative wage is $415.43, based on an average of his total earning from 1991 to 1995.

Finally, Claimant argues that if I focus on Claimant's wage at the time of injury, as opposed to prior years, then the average weekly wage should be $440.00. He reaches this figure by adding his salary to the value of lodging provided by Employer. Specifically, Claimant notes that he earned $5.75 per hour for a forty-eight hour week, totaling $276.00, and lodging valued at $24.00 per day, or $168.00 per week. Accordingly, Claimant argues his total average weekly wage at the time of injury totaled $440.00.

Having reviewed the parties positions as to average weekly wage and the supporting documentation, I find that none of these figures is an accurate representation of Claimant's average weekly wage. Therefore, for the following reasons, I have reached my own conclusion as to the proper average weekly wage in this matter.

First, I reject Claimant's arguments that the average weekly wage should include the amount that would have been paid for his meals and lodging. The record shows that Employer provided meals and lodging to all employees, including Claimant. Ms. Lee testified that the value of the meals was $7.00 per day, and the lodging cost, as charged to visitors, was $6.00 per day until December 31, 1996, and $24.00 per day from January 1, 1997 forward. Further, the record demonstrates that employees would not be provided cash in lieu of the meals and lodging. (TR 124-27).

Under Section 2(13) of the Act, wages are defined as:

> ... the money rate at which the service rendered by an employee is compensated

> by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C.A. § 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. § 902(13)

The above-stated definition of "wages," as amended in 1984, codified the Supreme Court holding in *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155 (CRT)(1983), *rev'g Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 14 BRBS 671 (D.C. Cir. 1981); *see Denton v. Northrop Corp.*, 21 BRBS 37, 46 (1988). This definition includes the reasonable value of any advantage received, if: (1) the advantage either flows directly or indirectly from the employer to the employee; (2) the advantage is easily ascertainable or readily calculable; (3) taxes are withheld; and (4) the advantage is not considered a fringe benefit.

Regarding the requirement that taxes be withheld, the Board notes that the plain language of the code does "not mandate that a benefit not subject to a tax withholding is not a wage per se." *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35, 43 (1990)(portion of claimant's salary paid into tax-sheltered annuity was considered "wages" even though it was deducted from claimant's salary before he received it and income tax was not paid on the sum until the year it was withdrawn from the account). In *Wausau Ins. Cos. v. Director*, OWCP, 114 F. 3d 120, 121 (9th Cir. 1997), the Ninth Circuit concluded: "[Section 902(13)] defers to the IRS criteria for deciding whether non-monetary compensation counts as wages. If it is not money, or an 'advantage' subject to withholding, it is not included."

In *Wausau*, the disabled employee had received meals and lodging from the employer. The Ninth Circuit concluded those benefits were not wages because they were not income under 26 U.S.C. § 119(a). The court noted that that section of the Internal Revenue Code provides that "the value of meals and lodging provided by an employer is income unless the meals and lodging are 'furnished ... for the convenience of the employer' and '(1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.' 26 U.S.C. § 119(a)." *Wausau*, 114 F.3d at 121.

According to the Internal Revenue code, the value of meals provided by the employer is excluded from income if the meals are provided for the convenience of the employer and are furnished on the business premises of the employer. 26 U.S.C. §119(a). Ms. Lee testified that Employer provided meals on its own premises and for its own convenience. (TR 128-29). The value of the meals are thus excluded from Claimant's average weekly wage.

The Internal Revenue Code excludes the value of lodging from income if the lodging is provided for the convenience of the employer and the employee is required to accept such lodging on the business premises as a condition of his employment. 26 U.S.C. § 119(a). Again, Ms. Lee testified that employee lodging was provided for the convenience of the Employer. (TR 129-30). Claimant, however, notes that employees were not required to take the lodging. Nevertheless, Claimant did not report the value of the lodging his received as income, nor was it treated as such on Claimant's W-2 forms. (EX F at 76-77, 80). As such, Claimant should not be entitled to now claim that the lodging was income for the purposes of calculating the average weekly wage.

Next, I reject Respondents' argument that Claimant's wage under Section 10(c) should be based on his hourly rate at the time of injury. Claimant's testimony clearly indicates that he had taken the food processor position with Employer with the hope and expectation of obtaining a position more in line with his qualifications in the near future. As such, the $276.00 per week did not reasonably reflect his wage earning capacity.

The only fair and equitable method of determining Claimant's wage is by examining his prior earnings during the six years preceding his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991).

However, in looking at Claimant's prior earnings, I reject the two methods proposed by Claimant. First, I find that Claimant's requested rate of $498.51 completely disregards the period when he voluntarily removed himself from the job market. As Respondents correctly point out, I must consider, among other factors, Claimant's willingness to work, in determining the average weekly wage and looking at prior years and earnings. *See Geisler v. Continental Grain Co.*, 20 BRBS 35, 38 (1987); *Jackson v. Potomac Temporaries Inc.*, 12 BRBS 410, 413 (1980). As such, I find a wage based solely on Claimant's average wage only during periods of employment, presents an inflated figure of his wage-earning capacity. Similarly, I reject Claimant's proposed rate of $415.84, as computed using his wages earned in 1991 to 1995, as this computation completely disregards Claimant's voluntary lack of earnings in 1996.

The proper average weekly wage for Claimant in this matter is $356.29, which adequately represents the fair and reasonable wage earning capacity for Claimant. This figure was calculated by averaging Claimant's earnings from 1991 to 1996, and dividing by fifty-two weeks.[7]

IV. Medical Expenses

Claimant is seeking reimbursement for past expenses and an award of future medical benefits. Respondents suspended medical benefits on June 6, 1997, after Claimant missed the independent medical evaluation appointment. Claimant missed this appointment because Employer sent the notice

[7]Claimant's earning from 1991 to 1996 were as follows: 1991, $23,228.39; 1991, $27,164.02; 1993, $24,697.38; 1994, $25,403.96; 1995, $10,640 [$560/week for 19 weeks]; 1996, $28.75. (CX 33-37; EX F) Thus, over the six year period Claimant earned $111,162.50 an average of $18,527.08 a year. Dividing that yearly average by 52 weeks, then results in an average weekly wage of $356.29.

of the appointment to the wrong address, resulting in Claimant not receiving notice of the appointment until after the scheduled time. Subsequently, Claimant requested authorization for treatment with Dr. Krost, which request was denied. (TR 72). Thereafter, Claimant incurred medical expenses relating to treatment by Dr. Krost between August of 1997 and May of 1998 and to treatment by Dr. Richard Wayne between March and May of 1998. (CX 40; CX 43; CX 51). Further, Claimant cites the deposition testimony of Dr. Rolnick who opined that Claimant's condition would most likely worsen over time. (EX I at 35-26)

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The test is whether the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). Further, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS at 189 (1986).

Dr. Krost indicated that his treatment, as well as Dr. Wayne's epidural injections, were necessary treatment related to Claimant's work-place injury. (CX 40 at 80-82; CX 51). Further, in his October 20, 1997 report, Dr. Rolnick concurred with Dr. Krost's opinion regarding these treatments. (EX B at 8). As such, Claimant is entitled to reimbursement for these expenses. Further, while Dr. Rolnick indicated that no further medical attention was necessary, in May of 1998 (EX B at 12), he stated in his deposition testimony that future worsening of Claimant's condition could occur. Claimant is thus entitled to payment of his future medical expenses that are necessary and reasonable to treat his work-place injury.

V. Section 8(f) of the Act

Respondents argue that Section 8(f) relief is warranted based upon Claimant's medical history. The District Director opposes Section 8(f) relief. The Director argues that Claimant did not suffer a pre-existing permanent partial disability that was manifest to the employer and which made his current disability materially or substantially greater.

On September 14, 1992, Claimant suffered a neck injury while working for City Electric. He was treated for this injury, and on August 10, 1993, he underwent a cervical fusion, which was performed by Dr. Lusk. (EX G) Dr. Lusk concluded that the surgery was a success and released Claimant to return to work without restrictions on October 1, 1993. (TR 52; EX G) Claimant did return to work in his prior position. Subsequently, on September 15, 1994, Claimant suffered a lower back injury and received treatment. On June 21, 1995, Claimant entered a settlement under Florida workers' compensation laws, in which he received a payment of benefits. In the settlement papers, there is a reference that in December of 1994, Dr. Lusk rated Claimant at a 9% permanent partial disability and also imposed work restrictions. Respondents argue that these facts are sufficient to

entitle them to an award of Section 8(f) relief.

It is well settled that in order for an Employer to be entitled to Section 8(f) relief, it must demonstrate that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309, 24 BRBS 69 (CRT) (*D.C. Cir.* 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989).

For the first requirement of a pre-existing permanent partial disability, Respondents argue that both the September 14, 1992 and September 15, 1995 injuries qualify. The existence of those two prior injuries, and subsequent medical treatment, is not in question. However, the record lacks sufficient evidence of a pre-existing partial disability. While Claimant's September 14, 1992 injury resulted in surgery on August 10, 1993, Dr. Lusk, Claimant's surgeon, released him to return to work without restrictions on October 1, 1993. (EX G). Despite this fact, Respondents cite to the Florida Workers' Compensation settlement document which states that Dr. Lusk placed Claimant at maximum medical improvement in December of 1994 with a nine (9) percent impairment.[8] (EX H at 105). This settlement document was the only evidence presented that the prior injury resulted in a permanent partial disability. This statement in a state workers' compensation settlement is insufficient to establish the existence of a permanent partial disability in the face of an opinion by the same doctor releasing Claimant to return to work without restriction. However, even if these contradictory statements were sufficient to meet the first requirement, Employer would still not be entitled to Section 8(f) relief.

The second requirement for Section 8(f) relief requires that a claimant's pre-existing permanent partial disability be manifest to the employer. For such an injury to be manifest, an employer need not have actual knowledge. Constructive knowledge is inferred from the existence of medical records documenting such an injury. *Esposito v. Bay Container Repair Co*, 30 BRBS 67, 68 (1996). Assuming Claimant's prior injuries qualify as a pre-existing condition under Section 8(f) there are ample medical records of his prior injuries, treatment, and surgery. Accordingly, Respondents have satisfied this requirement.

The third requirement of Section 8(f) relief requires that the pre-existing condition must, in some way, combine with the current injury to result in a greater disability. In the case of permanent total disability, the current total permanent disability must be found not to be due solely to the subsequent compensable injury alone. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1306, 26 BRBS 1 (CRT) (2d Cir. 1992); *Dominey v. ARCO Oil & Gas Co.*, 30 BRBS 134 (1996). Respondents have neither offered nor cited to any medical opinion evidence that Claimant's current total disability was in any way caused by his prior condition. All of the medical opinion evidence supports the fact that

[8]Specifically, the Settlement states: "According to Dr. Lusk, the Claimant achieved maximum medical improvement in December, 1994, with a 9% permanent partial impairment rating to the body as a whole. . . . The following work restrictions were imposed: a. No lifting in excess of 25 pounds and/or no frequent carrying of objects up to 10 pounds; b. allowance for alternating sitting, standing, and walking." (EX H at 105)

Claimant's currently medical condition is due solely to his February 13, 1997 injury. None of the Doctors who examined Claimant after February of 1997 have noted a pre-existing condition as a reason for a materially and substantially greater disability, or any current disability at all. Accordingly, Respondents are not entitled to Section 8(f) relief.

VI. Interest

Although not specifically authorized in the Act, it has been accepted practice that interest is assessed on all past due compensation payments. The Board has held that, in order to account for inflation, the rate awarded should be the same as "the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982)" which "is periodically changed to reflect the yield on United States Treasury Bills[.]" *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on recon.*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order.

VII. Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Respondents. Claimant's attorney has not submitted his fee application. Within forty five (45) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall than have thirty (30) days to comment thereon. Each service for which a charge is made shall be set forth in a separate line, specifically identifying the service and by whom the service was rendered. Each objection shall be set out on a line by line basis, specifically providing the reason for the objection and to which entry the objection applies. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after September 10, 1997, the date of the informal conference. Services performed prior to that date should be submitted to the District Director for his or her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

IT IS ORDERED that:

1. The Employer, AUTEC Range Services, and the Carrier, CIGNA Insurance Company , shall pay to the Claimant, David Conner, compensation for his temporary total disability from February 13, 1997 through April 30, 1998, based upon an average weekly wage of $356.29, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on May 1, 1998, and continuing thereafter, the Respondents shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $356.29, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his February 13, 1997 injury.

4. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries referenced herein may require, including the payment of the outstanding medical expenses specifically discussed and awarded herein, subject to the provisions of Section 7 of the Act.

5. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

6. Claimant’s attorney shall file, within forty five (45) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents’ counsel who shall then have thirty (30) days to respond.

At Washington, D.C. Entered this day, March 23, 1999, by:

_____

JAMES GUILL
Administrative Law Judge